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may change with the facts at issue;¹⁵ were England invaded, its content would be different from the situation involved in a continental war. The whole point involved is the disappearance of the Roman notion of sovereignty and its replacement by the idea of a service to which the state itself, no less than its members, are bound. In *Rex v. Halliday* the court mistook these implications by its determination to regard the issue as a purely administrative question. Its result, as Lord Shaw, perhaps somewhat dramatically, asserted, is to make the government "a Committee of Public Safety . . . the analogy is with a practice more silent, more sinister, the *lettres de cachet* of Louis Quatorze. . . . It . . . is the negation of public safety or defense. It is poison to the commonwealth."¹⁶ No one who considers the problem involved can doubt that we are here at the beginning of an evolution which may result in giving a new significance to the notion of the supremacy of law.

RIGHT OF A PATENTEE TO RESTRICT THE PRICE AND THE USE OF A PATENTED ARTICLE. — At common law any attempt to restrict the use or price of a chattel by notice to the purchaser or sub-purchaser was held void¹ as contravening the public policy in favor of the free alienation of chattels.²

The Patent Act grants to the patentee the exclusive right to "make, use, and vend" the article patented.³ It has been contended that this monopoly granted to the patentee takes the patented article out of the general common law rule, and that the exclusive right to use and to vend enables the patentee, indirectly, by a license arrangement to restrict the use and the price of his patented article by a mere notice attached thereto, and that any use or sale of the article in violation of the license constitutes an infringement of the patent. Since a suit for infringement of a patent right is a suit arising under the patent laws of

¹⁵ Cf. DUGUIT, *DROIT SOCIAL, DROIT INDIVIDUEL*, lect. 1, and cf. Cohen, "Jus Naturale Redivivum," 25 *PHILOSOPH. REV.* 761 f.

¹⁶ [1917], A. C. 292.

¹ *Appollinaris Co. v. Scherer*, 27 Fed. Rep. 18; *Garst v. Hall and Lyon Co.*, 179 Mass. 588, 61 N. E. 219; *Spencer's Case*, 5 Coke, 16 a.

² See *Park v. Hartman*, 153 Fed. Rep. 24, 39, where Lurton, J., speaking for the court, said: "The right of alienation is one of the essential incidents of a right of general property in movables, and restraints on alienation have generally been regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. 'If a man,' says Lord Coke, in *COKE ON LITTLETON*, § 360, 'be possessed of a horse or any other chattel real or personal, and give his whole interest or property therein upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him so as he hath no possibility of revert; and it is against trade and traffic and bargaining and contracting between man and man.'" This passage is quoted with approval by Mr. Justice Hughes in *Dr. Miles Medical Co. v. Park and Sons Co.*, 220 U. S. 373, 404; 31 Sup. Ct. Rep. 376, 383. See also GRAY, *RESTRAINTS ON ALIENATION*, 2 ed., §§ 27, 28.

³ U. S. COMP. STAT. 1913, § 9428; U. S. REV. STAT. § 4884.

the United States the federal courts have exclusive jurisdiction in these cases.⁴

Several decisions in the lower federal courts upheld this position as to price restrictions,⁵ and the United States Supreme Court in *Bement v. National Harrow Co.*⁶ seemed also to commit itself to this view. But that court definitely decided in *Bower v. O'Donnel*⁷ that the mere fact that an article is patented does not give to the patentee the right to restrict its price on resale.

As to use two general types of restrictions have been submitted to the courts for consideration. The first is a restriction which regards the use of the patented article only. Such restrictions have been upheld in the lower federal courts,⁸ and at least in one case by the Supreme Court.⁹ The second type is a restriction on the article primarily with reference to its use with non-patented accessories and seeks to confine its use to accessories specified by the patentee. This sort of restriction was first upheld in the lower federal courts in *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*,¹⁰ which was followed by a long line of decisions in accord.¹¹ The rule of the Button-Fastener Case was affirmed by the Supreme Court in *Henry v. A. B. Dick & Co.*;¹² but this decision has recently been overruled in *Motion-Picture Patents Co. v. Universal Film Manufacturing Co.*,¹³ where the court refused to enforce a restriction imposed by the patentee on his patented motion-picture projecting machine to the effect that it should be used only with films of the patentee's manufacture. It is not clear that the Motion-Picture Case also overrules the cases upholding restrictions of the first type.

In neither the first nor the second type is the restriction as to use expressly warranted by the patent law. So if there is a warrant it must be implied. The argument in favor of restrictions of the first type is based on the theory that since the patent law gives to the patentee the

⁴ *DeWitt v. Elmira Nobles Mfg. Co.*, 66 N. Y. 459; *Rice v. Garnhart*, 34 Wis. 453; *Kendall v. Windsor*, 6 R. I. 453; *Elmer v. Pennel*, 40 Me. 430. See ROBINSON ON PATENTS, §§ 855, 861.

⁵ *Edison Phonograph Co. v. Pike*, 116 Fed. 863; *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424; *National Phonograph Co. v. Schlegel*, 128 Fed. 733; *The Fair v. Dover Mfg. Co.*, 166 Fed. 117; *Edison Phonograph Co. v. Kaufmann*, 105 Fed. 960.

⁶ 186 U. S. 70, 22 Sup. Ct. Rep. 747.

⁷ 229 U. S. 1, 33 Sup. Ct. Rep. 616. Affirmed, *Straus v. Victor Talking Machine Co.*, 37 Sup. Ct. Rep. 412.

⁸ *Dickerson v. Matheson*, 57 Fed. 524; *Commercial Acetylene Co. v. Autolux Co.*, 181 Fed. 387; *International Pavement Co. v. Richardson*, 75 Fed. 590; *New York Bank Note Co. v. Hamilton Bank Note Engraving and Printing Co.*, 83 Hun 593, 31 N. Y. Supp. 1060.

⁹ *Mitchell v. Hawley*, 16 Wall. 544.

¹⁰ 77 Fed. 288.

¹¹ *Tubular Rivet and Stud Co. v. O'Brien*, 93 Fed. 200; *Cortelyou et al. v. Lowe*, 111 Fed. 1005; *Rupp and Wittgenfeld Co. v. Elliott*, 131 Fed. 730; *A. B. Dick Co. v. Milwaukee Specialty Co.*, 168 Fed. 930; *Crown Cork and Seal Co. v. Brooklyn Bottle Stopper Co.*, 172 Fed. 225.

¹² 224 U. S. 1, 32 Sup. Ct. Rep. 364. The same result has been reached by the English court under a similar statute. *Incandescent Gas Light Co. v. Cantelo*, 12 Pat. L. R. 262; *Incandescent Gas Light Co. v. Brogden*, 16 Pat. L. R. 179.

¹³ *Advance Sheets*, 37 Sup. Ct. Rep. 416.

sole right to use the article for all purposes, the patentee-vendor may grant this plenary right of use to the vendee or he may grant only a partial right to use, for example, to use only in a particular manner, even though title passes. The validity of such a restriction thus rests fundamentally on the rule that the measure of the grantee's right is the extent of the grant.¹⁴ In the second type of restriction the reasoning is somewhat different. There the argument proceeds upon the proposition that, since the patentee may withhold his patent altogether from public use,¹⁵ he must logically be permitted to impose any condition he sees fit upon such use as he may allow. Or as Mr. Justice Holmes puts it in his dissenting opinion in the Motion-Picture Case, "the measure of a condition is the consequence of a breach, and if that consequence is one that the owner may impose unconditionally, he may impose it conditionally upon a certain event."¹⁶

Both of these arguments are predicated upon the position that even after title to a patented article has passed, the patentee's monopoly as to use still clings to it. A more accurate application of the patent law, however, leads to the conclusion that once an absolute title to the patented article is passed by the patentee the veil of monopoly is shorn from the article, and that thereafter its use and control are regulated not by the special rules of the patent law but by the general rules of the law governing property. The bare fact that an article is patented does not render it immune from the police power of the several states,¹⁷ or enable the patentee to make a hard bargain respecting it,¹⁸ nor does it warrant the imposition of a condition which necessitates the abridgment of a public duty.¹⁹ If the monopoly granted by the patent law is insufficient to defeat these greater public policies, it is difficult to understand on what compulsion it is permitted to defeat a lesser public policy. It is true that an assignment of a patent right may be subject to such conditions and control as the patentee may choose to impose, for the assignee enjoys his rights directly under the patent law. But when a patented article is sold the vendee's rights therein are not fixed by the patent law but by the common law rules of ownership in property.²⁰ The cases which hold that an assignment of a patent may be subject to restrictions are no authority, then, for restricting the use of a patented article after an absolute title thereto has passed.

It is submitted, therefore, that there is nothing in the patent law which peculiarly enables a patentee to restrict the use or the price of a patented article, or justifies a restraint on the alienation of a patented

¹⁴ See Mr. Justice Clifford's opinion in *Mitchell v. Hawley*, note 8, *supra*.

¹⁵ *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 28 Sup. Ct. Rep. 748.

¹⁶ See also the argument of Mr. Justice Lurton in *Henry v. A. B. Dick Co.*, note 12, *supra*.

¹⁷ *Patterson v. Kentucky*, 97 U. S. 501; *Allen v. Riley*, 203 U. S. 347, 27 Sup. Ct. Rep. 95.

¹⁸ *Pope Manufacturing Co. v. Gormully*, 144 U. S. 224, 12 Sup. Ct. Rep. 632.

¹⁹ *Missouri ex rel. Baltimore and O. Tel. Co. v. Bell Telephone Co.*, 23 Fed. 539; *Delaware and Atlantic Tel. and Tel. Co. v. Delaware ex rel. Postal Telegraph-Cable Co.*, 3 U. S. App. 30.

²⁰ This distinction is indicated by Mr. Chief Justice Taney in *Bloomer v. McQuewan*, 14 How. 539, 549.

article which would not be permitted if the article were not patented. And it is much better on principle to discard the alleged distinction between patented and non-patented articles in this connection, since it will lead to greater uniformity and simplicity in the law. The Motion-Picture Case is a far-reaching step in this direction and is to be welcomed as such. Nor does this result lack legislative sanction. Congress in expressly providing that the Clayton Act shall apply as well to patented as to non-patented articles²¹ has quite obliterated the last vestige of this distinction so far as the legality of monopolies is concerned.

If it is true that patented articles are to be treated alike with non-patented articles so far as restrictions as to price and use are concerned, it is not untimely to inquire whether after all, in view of modern commercial development in methods of marketing and distribution, the common-law rule against such restrictions is really a wise one in the light of the whole policy of the law. Free alienation of chattels is only one of the many policies of the law. The protection of the rights of ownership in property is a policy equally as potent and equally as important. An ideal rule as to price and use restrictions would be based on neither one to the exclusion of the other, but would rather meet both. A similar conflict of equal policies is encountered in the consideration of the validity of contracts not to engage in a certain trade entered into by the vendor on the sale of a business. In early times all such contracts were probably bad,²² but in *Mitchell v. Reynolds*,²³ the leading case on this subject, Lord Macclesfield held that a contract of this sort is valid, provided it is made to extend to a limited area only. But the House of Lords, in *Nordenfelt v. Maxim-Nordenfelt Guns and Ammunition Co.*,²⁴ realizing that a rule of law that depends on the balancing of two contrary policies cannot be settled adequately by a fixed and inelastic standard, formulated the principle that the test of the validity of a contract not to engage in a trade is whether or not it is necessary reasonably to protect the property rights of the promisee; and there are decisions in this country which in effect adopt this principle.²⁵

²¹ 38 STAT. AT L. 730, ch. 323. The section in question makes it unlawful for any person engaged in interstate commerce "to lease or make a sale or contract for sale of goods, . . . machinery, supplies or other commodities, *whether patented or unpatented* [italics supplied], for use, consumption or resale . . . or fix a price charged therefor, . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use . . . the goods . . . machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller where the effect of such lease, sale or contract for sale, or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

²² See YEAR BOOK, 2 HEN. V, fol. 5, pl. 26, which was a suit on a bond given by a dyer not to use his craft within a certain city for half a year. The court reprimanded the plaintiff for securing such a contract and threw him out of court.

²³ 1 P. Wms. 181. The words of the court are: "Wherever a sufficient consideration appears to make it a proper and useful contract, and such as cannot be set aside without injury to the fair contractor, it ought to be maintained; but with this constant diversity, *viz.* where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by and by."

²⁴ [1894] A. C. 535.

²⁵ *National Enameling and Stamping Co. v. Haberman*, 120 Fed. 415; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419.

It is urged that the validity of restrictions on the use and price of chattels should be determined by the principle of the Nordenfelt Case. Wherever such restrictions are necessary reasonably to protect the property rights of the vendor they should be allowed. But even under this test the Motion-Picture Case can be supported. There the vendor sought in his restriction not to protect his property rights in the patent under which he manufactured and sold the machine, but rather to stimulate his business in an independent and separate commodity. The mandate of reasonableness requires that the property right protected must be directly connected with the chattel restricted; that there must be such a relation as that existing between property rights under a patent and the patented article, or property rights in the good-will of a business in proprietary chattels and the proprietary chattel. Where use of an article in connection with accessories other than those prescribed by the vendor is likely to bring the vendor's business in that class of articles into general disrepute, it is only reasonable that the vendor should be permitted to say with what supplies the article may be used. Likewise where the practice of price cutting by retail dealers is likely to destroy the good-will in the business of a manufacturer of a proprietary article built up by an expensive and consistent campaign of advertising, the manufacturer should be permitted to preserve his good-will by enforcing a price restriction and eliminating the dangerous competition among price cutters.²⁶

The Clayton Act²⁷ is essentially declaratory of the common law and should not properly be considered to prohibit such measures as are necessary reasonably to protect vested property rights.

OFFENSES UNDER SECTION THIRTY-SEVEN OF THE FEDERAL CRIMINAL CODE. — Section thirty-seven of the Criminal Code deals with two distinct crimes — conspiracies to commit an offense against the United States, which, as there is no federal common law, has been held to mean conspiracies to violate any federal penal statute; and conspiracies to defraud the United States, which will be considered more at length.¹ This latter clause of the statute has been construed as covering a wide range of offenses. It is well settled that to constitute this offense it is unnecessary that the intent or natural effect of the confederation be to deprive the United States of property or to cause any direct pecuniary loss. It is enough if its tendency be to cause the subversion or derangement of any governmental function.² The theory of these cases seems

²⁶ For an illuminating discussion of the reasonableness of price control see E. S. Rogers, "Predatory Price Cutting as Unfair Trade," 27 HARV. L. REV. 139. See also 30 HARV. L. REV. 68.

²⁷ See note 21, *supra*.

¹ SECTION THIRTY-SEVEN OF THE CRIMINAL CODE OF THE UNITED STATES; 35 STAT. AT L. 1096, ch. 321. If two or more persons conspire to commit any offense against the United States, or to defraud the United States in any manner for any purpose, and any of the parties do any act in pursuance thereof . . . , etc.

² *Haas v. Henkle*, 216 U. S. 462. A conspiracy to cause the issuance of the defendants of information as to contents of United States reports of the cotton crops. *United States v. Morse*, 116 Fed. 429. A false report by officers of a bank to the comptroller